Public Prosecutor v Omar bin Rudding

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05(H)-191–07 OF 2015
DAVID WONG, ABANG ISKANDAR AND ZAMANI A RAHIM JJCA
11 JANUARY 2017

Criminal Law — Appeal — Appeal against sentence — Respondent pleaded guilty to alternative charge of culpable homicide under s 304(a) of the Penal Code — Respondent convicted and sentenced to 12 years imprisonment — Whether sentence imposed on respondent manifestly inadequate — Whether trial judge did not take public interest into account — Penal Code s 304(a)

The respondent pleaded guilty to an alternative charge of culpable homicide under s 304(a) of the Penal Code ('the Code') offered by the prosecution and subsequently, the respondent was convicted of the said offence and sentenced to 12 years imprisonment with effect from the date of arrest. Dissatisfied by the lenient sentence imposed by the learned trial judge, the prosecution filed the present appeal. The prosecution submitted that the sentence imposed on the respondent was manifestly inadequate and the trial judge did not take public interest into account.

Held, affirming the sentence imposed by the High Court and dismissing the appeal:

(1) Sentencing is a matter of judicial discretion of the trial court. The court was of the view that the sentence of 12 years imprisonment in the circumstances of the case was adequate. It was not manifestly or grossly inadequate. The court was guided by the observation of Raja Azlan Shah, AG LP (as His Royal Highness then was) in the case of *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 (see para 20).

[Bahasa Malaysia summary

Responden mengaku bersalah terhadap tuduhan alternatif homisid bersalah di bawah s 304(a) Kanun Keseksaan ('Kanun') yang ditawarkan oleh pihak pendakwaan dan kemudiannya, responden disabitkan terhadap sabitan tersebut dan dijatuhkan hukuman penjara 12 tahun berkuat kuasa dari tarikh penangkapan. Tidak berpuas hati dengan hukuman ringan yang dikenakan oleh hakim perbicaraan yang bijaksana, pihak pendakwaan memfailkan rayuan ini. Pihak pendakwaan berhujah bahawa hukuman yang dikenakan ke atas responden jelas tidak memadai dan hakim perbicaraan tidak mengambil kira kepentingan awam.

Diputuskan, mengesahkan hukuman yang dikenakan oleh Mahkamah Tinggi dan menolak rayuan:

(1) Hukuman adalah perkara budi bicara kehakiman mahkamah perbicaraan. Mahkamah berpendapat bahawa hukuman penjara 12 tahun dalam keadaan kes adalah memadai. Ia jelas bukan atau tidak memadai. Mahkamah dibimbing oleh pemerhatian yang dibuat oleh Raja Azlan Shah, Pemangku LP (Baginda pada masa itu) di dalam kes *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 (lihat perenggan 20).]

Notes

For cases on appeal against sentence, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 84–88.

Cases referred to

Azwel bin Mohd Ali lwn Pendakwa Raya [2013] 1 MLJ 253; [2012] 6 CLJ 809, CA (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (folld)
Pendakwa Raya lwn Dominic Lang [2011] MLJU 1525; [2012] 5 CLJ 238, HC (refd)
Vinaga Moorthy a/l Gopal v PP [2003] 2 MLJ 87; [2003] 1 CLJ 758, CA (refd)

Legislation referred to

Penal Code ss 302, 304(a)

Appeal from: Criminal Trial No TW2–45B-3/7 of 2014 (High Court, Tawau)

Mohd Zain bin Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Rozainah bt Mohd Said (Rozainah & Co) for the respondent.

Zamani A Rahim JCA:

INTRODUCTION

[1] The respondent was originally charged with an offence of murder under s 302 of the Penal Code. Subsequently on 15 June 2014 the prosecution tendered an alternative charge against the respondent under s 304(a) of the Penal Code which reads:

Alternative Charge

> Bahawa kamu pada 18.11.2012, jam lebih kurang 10.00 pagi hingga 10.30 pagi bertempat di rumah pekerja Ladang Matambak, Jalan Silabukan, di dalam Daerah Lahad Datu, dalam Negeri Sabah telah menyebabkan kematian Amiruddin bin Raside (Passpot No: AR 389047) dengan niat menyebabkan

kecederaan tubuh badan yang mungkin menyebabkan kematiannya, dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan.

[2] The charge was read and explained to the respondent. He pleaded guilty to the charge and he understood the charge and the nature and consequences of his plea.

STATEMENT OF FACTS AND SENTENCE

[3] The prosecution then tendered the statement of facts. It is reproduced below:

Facts of case

1. Pada 8.11.2012, Omar bin Rudding, orang kena tuduh (OKT) dalam kes ini sedang bermain judi di rumahnya bersama Amiruddin bin Raside (simati dalam kes ini) dan bersama beberapa orang kawannya yang lain bernama Saripuddin, Iwan dan Udin;

2. Permainan judi tersebut jenis Domino, di mana OKT memperolehi hasil kutipan daripada mana-mana pemain yang bermain judi di rumahnya;

3. Pada hari kejadian telah berlaku salah faham di mana simati dan tiga orang kawannya telah meminta semula duit kutipan yang telah dibayar kepada OKT. Ini telah menimbulkan kemarahan OKT;

4. Simati dan tiga orang kawannya telah bersama-sama memukul OKT. OKT kemudiannya masuk ke dalam biliknya dan mengambil sebilah pisau dan menyerang kesemua mereka;

5. OKT kemudian telah mengejar dan berjaya menikam Amiruddin bin Raside, berumur 36 tahun, bangsa Bugis. Amiruddin telah meninggal dunia akibat pendarahan yang banyak dan tikaman di bahagian belakang dada kiri yang mencederakan paru-paru kiri dan jantung. OKT juga telah menikam Sarippudin bin Parakkasi, bangsa Bugis, 36 tahun, ditikam di bahagian perut. OKT juga telah menikam Iwan bin Kadir, bangsa Bugis, 39 tahun, ditikam di bahagian rusuk kiri. OKT juga telah menikam Udin bin Hanung, bangsa Bugis, 35 tahun, ditikam di bahagian dada oleh OKT;

6. OKT telah melarikan diri dan bersembunyi di sebuah kedai runcit berdekatan dengan rumahnya. Kemudian pihak polis sampai di tempat kejadian dan berjaya menahan OKT setelah dia diarahkan keluar dari kedai runcit tersebut. Sebilah pisau yang dipercayai digunakan dalam pergaduhan ini telah dirampas dari OKT;

7. Siasatan dijalankan oleh Inspektor Abdul Muttalib bin Harun dari jabatan siasatan jenayah IPD Lahad Datu;

8. Laporan post-mortem menyatakan punca kematian Amiruddin bin Raside ialah 'stab wounds on the back of the left chest';

9. Pisau yang dirampas daripada OKT telah dihantar ke Jabatan Kimia Sarawak, dan laporan menyatakan terdapat tiga kesan profail DNA pada pisau tersebut dan darah simati adalah konsisten dengan salah satu profail yang wujud pada pisau itu;

10. Siasatan juga mendapati OKT telah dituduh di Mahkamah Majistret Lahad Datu pada 11.6.2013 di bawah seksyen 324 Kanun Keseksaan kerana menikam (Sarippudin), (Iwan) dan (Udin). OKT telah mengaku salah dan dihukum penjara 18 bulan dan 3 sebatan (bagi Sarippudin), penjara 18 bulan dan 6 sebatan (bagi Iwan) dan penjara 18 bulan dan 3 sebatan (bagi Udin). Hukuman berjalan serentak;

11. Siasatan juga mengesahkan bahawa pergaduhan ini berlaku kerana simati dan tiga orang kawannya telah meminta semula duit kutipan judi dan mereka telah bersama-sama memukul OKT;

12. Oleh yang demikian, OKT adalah bersalah sebagaimana pertuduhan pilihan seksyen 304(a) Kanun Keseksaan.

[4] The respondent admitted the facts as correct. The statement of facts was marked as exh P2. The learned deputy then tendered the following exhibits namely:

List of exhibits

1. Lahad Datu Report No 8116/2012	–	P3
2. Lahad Datu Report No 8115/2012	–	P4
3. A post-mortem report	–	P5
4. 23 pieces of photographs of the crime scene	–	P6(1–23)
5. 12 pieces of photographs of port-mortem	–	P7(1–12)
6. A chemist report	–	P8
7. A knife shield, and	–	P9
8. A knife	–	P10

[5] Having accepted the respondent's plea of guilty, he was convicted under the alternative charge of culpable homicide not amounting to murder under s 304(a) of the Penal Code which carries an imprisonment term of 30 years.

[6] Upon mitigation, the respondent was sentenced to 12 years of imprisonment term with effect from the date of his arrest.

[7] Aggrieved by a lenient sentence imposed on the respondent, the prosecution appealed to this court.

THE APPEAL

[8] In its petition filed on 26 August 2016, the prosecution listed two grounds of appeal as follows:

1. Yang Arif Pesuruhjaya Kehakiman telah khilaf dari segi fakta dan undang-undang apabila menjatuhkan hukuman yang apabila menjatuhkan hukuman tidak setimpal (*manifestly inadequate*) iaitu 12 tahun penjara daripada tarikh tangkap sedangkan hukuman pemenjaraan maksimum yang boleh dikenakan sehingga 30 tahun pemenjaraan.

2. Yang Arif Pesuruhjaya Kehakiman telah khilaf dari segi undang-undang dan fakta apabila menjatuhkan hukuman penjara 10 tahun (sepatutnya dibaca 12 tahun) dari tarikh tangkap sedangkan ia bukanlah satu hukuman yang tidak berpadanan untuk menjaga kepentingan awam dan menjadi factor deteran serta pengajaran kepada responden.

[9] The prosecution's complaint is essentially the sentence imposed on the respondent is manifestly inadequate and the trial judge did not take public interest into account.

SUBMISSION BY LEARNED DEPUTY

[10] An offence culpable homicide not amounting to murder under s 304(a) is a serious offence as the maximum sentence has been enhanced from 20 years to 30 years imprisonment.

[11] While referring to public interest, the trial judge failed to reflect the public has been taken into account in his judgment and His Lordship merely paid a lip service. The public interest consideration must be given utmost priority and it overrides the personal interest of the respondent: see *Azwel bin Mohd Ali lwn Pendakwa Raya* [2013] 1 MLJ 253; [2012] 6 CLJ 809.

[12] The respondent was aggressive and used a long knife as a murder weapon. There were three serious stab wounds on the deceased.

[13] The trial judge was over sympathetic by the mitigation advanced by learned counsel.

[14] The trend of sentencing in respect of pleading guilty cases of this type of crime would be between 15–20 years imprisonment.

A REBUTTAL BY THE RESPONDENT

[15] Thereafter learned counsel for the respondent advanced his rebuttal as follows:

B 1. The respondent pleaded guilty at first instance

– The plea of guilt made by the respondent at first instance has saved time and cost of all parties, including court;

– Time and resources of witnesses were put to better use;

C – The respondent is entitled to 1/3 credit (*Tan Lay Chen v PP*);

– It is trite law that the respondent is entitled to the 1/3 credit;

– The learned judge was correct when imposing 12 years imprisonment to the respondent.

D 2. No aggravating factor

– There was no aggravating factors to impose more severe punishment to the respondent;

– *PP v Mohd Nooh Yusof & Others*: Severe punishment should only be given in worst possible example;

E – The fact in the present case is not a kind of worst possible example.

3. The crime was not a premeditated in nature

F – The crime broke out after a fight;

– The fight was a sudden fight.

4. The respondent could have been the victim or deceased in the present case

– There were four (4) friends attacking the respondent;

G – The four (4) friends initiated the attack against the respondent;

– The respondent was all alone defending himself from the four (4) attacking friends;

– The friends were drunk and it was probable that they might beat up the respondent until he died.

H 5. The deceased and the friends were carried away as they were drunk

– They were drinking and gambling before the fight broke out;

I – They all have lost control over their act as they were drunk;

– The respondent did what best was to protect himself from the serious attack;

– The respondent failed to consider the consequences of his act as he was drunk.

The decision made by the learned judge is correct and should not be disturbed.

[16] Having considered the submission, the rebuttal by the respondent and the surrounding circumstances of the case, the trial judge sentenced the respondent to 12 years imprisonment commencing from the date of arrest.

[17] Dissatisfied with the lenient sentence imposed, the prosecution filed an appeal to this court. Upon hearing the appeal on 14 November 2016, we affirmed the trial judge's sentence of 12 years imprisonment with effect from date of arrest.

OUR DECISION

[18] Before passing sentence, the trial judge referred to the case of *Pendakwa Raya lwn Dominic Lang* [2011] MLJU 1525; [2012] 5 CLJ 238 and also the case of this court in *Vinaga Moorthy a/l Gopal v Public Prosecutor* [2003] 2 MLJ 87; [2003] 1 CLJ 758 which deals with the appropriate length of custodial sentence in this type of crime.

[19] When imposing the sentence on the respondent, the trial judge said as follows:

> The offence committed by the accused in this case is a very serious one which carries the maximum imprisonment sentence of 30 years. A human life was lost in the hands of the accused. Hence public interest demands that severe sentence to be imposed on the accused not only to punish the accused but also to deter other would be offenders from committing the same offence in the future.
>
> However, it is also trite law that the court must also consider any mitigating factor before imposing a sentence and in doing so the court is entitled to consider any extenuating circumstances of the case: see *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40.
>
> In this case it is proven that there were misunderstanding between the accused on the one hand and the deceased and the other three players on the other hand resulting on the assault on the accused by the deceased and the other three players. It was after this assault that the accused retaliated by taking the knife from his room and started to attack them. In my opinion the offence was not premeditated one, but rather a reaction on his part after being attacked. I must not be seen as approving the act of the accused in taking the law into his own hand, but will consider his act as a spontaneous response to the aggressive act of the deceased.
>
> On the other hand the accused had pleaded guilty which had saved a lot of court time. This fact must be given due consideration in his favour.
>
> Having considered the aforesaid reasons I sentence the accused to 12 year imprisonment from the date of arrest.

[20] We recognised that sentencing is a matter of judicial discretion of the trial court. We were of the view that the sentence of 12 years imprisonment in the circumstances of this was adequate. It was not manifestly or grossly inadequate. We were guided by the observation of Raja Azlan Shah, AG LP (as His Royal Highness then was) in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 as follows:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far out-side the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525). It is for that reason that some very conscientious judges have thought it their duty to visit particulars crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to a view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

[21] Based on the above reasons, we had accordingly affirmed the sentence of 12 years imprisonment commencing from the date of arrest imposed by the High Court on the respondent. The appeal by the prosecution was therefore dismissed.

Sentence imposed by High Court affirmed; appeal dismissed.

Reported by Dzulqarnain Ab Fatar